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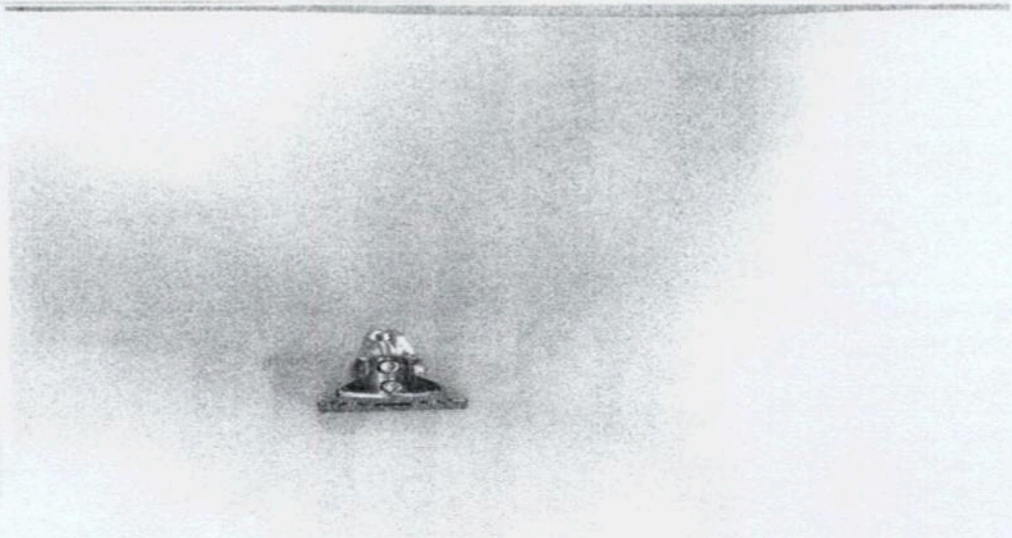
Re: SCULPTURE
Control No. 61-213-9329(A)

Dear Mr. Friederichs:

I am writing on behalf of the Copyright Office Board of Appeals in response to your letter dated November 18, 2003, requesting a second reconsideration of our refusal to register a work entitled "SCULPTURE" on behalf of your client, Michael Jueneman. The Board of Appeals has carefully examined your application, the deposit, and all correspondence in this case concerning registration of SCULPTURE and affirms the denial of registration.

I. DESCRIPTION OF WORK

The subject work is the end hook of a tape measure. It is a small, two-inch long by one-inch high piece of slightly bent metal, formed by two separate pieces of metal attached together by an interlocking clasp mechanism. The shape of the work resembles a hook, with perforated edges along one end and a curved top edge. There is a small oval cut-out on the front of the work, located in between two round metal circles.



II. ADMINISTRATIVE RECORD

A. Initial Application and Copyright Office's Refusal to Register

On February 23, 2003, the Copyright Office received a Form VA application submitted by you on behalf of your client Michael Jueneman, seeking to register the above described work entitled SCULPTURE as a sculptural work. In a letter dated March 11, 2003, Visual Arts Section Examiner Kathryn Sukites rejected the application because she determined that the work appeared to be a "useful article" that did not contain any separable authorship needed to sustain a copyright claim. (Letter from Sukites to Friedrichs of 3/11/03, at 1.)

Ms. Sukites emphasized that although copyright law protects works of artistic craftsmanship insofar as their form, such protection does not extend to such works' mechanical or utilitarian aspects. She further explained that protection of a useful article's design will be available only if such design incorporates pictorial, graphic, or sculptural authorship that is either physically or conceptually separable from the utilitarian aspects of the article. Ms. Sukites concluded that "[b]ecause all of the elements of the work you deposited are either related to the utilitarian aspects or function, or are subsumed within the overall shape, contour, or configuration of the article, there is no physically or conceptually 'separable' authorship that supports a copyright registration." *Id.* at 2.

B. First Request for Reconsideration

In a letter dated May 5, 2003, you requested reconsideration of the Copyright Office's refusal to register this work. You disputed Ms. Sukites' assessment that the work constitutes a "useful article," arguing instead that the work is a "decorative piece of bent metal" that has no identifiable use other than as a sculpture. (Letter from Friederichs to Sukites of 5/5/03, at 1, 5.) Referring to the definition of "pictorial, graphic, and sculptural works" in 17 U.S.C. § 101, you claimed that the "creative features" of the end hook are both physically and conceptually separable from the utilitarian item, a tape measure. *Id.* at 1-2. You explained that SCULPTURE had been physically separated from the utilitarian article using a pair of scissors, and you emphasized that only the end hook itself had been submitted for registration, unattached to the tape measure. *Id.* at 3. You further argued that the artistic features of SCULPTURE are conceptually separable

from the tape measure, that "the non-linear edges and red and blue headlights and/or swooping tongue-like appearance can be carved into wood, glass, the back of a chair or other article." *Id.* at 5. In your opinion, the capability of the end hook to exist physically and conceptually independently of the useful article entitles the work to a copyright registration. *Id.* at 6.

C. Examining Division's Response to First Request for Reconsideration

In response to your request and in light of the points raised in your letter of May 5, 2003, Attorney Advisor Virginia Giroux of the Examining Division reexamined the application and determined SCULPTURE to be a useful article that lacks any authorship that is both separable and copyrightable. (Letter from Giroux to Friederichs of 7/16/03, at 1.) First, she refuted your argument that the work, once it is physically separated from the useful article, becomes a decorative piece of bent metal and no longer a useful article. Citing 17 U.S.C. § 101, which defines a "useful article" as an article having an intrinsic utilitarian function, she suggested that SCULPTURE has at least one known or stated function--it hooks an object to be measured and assists in pulling out the tape. *Id.* Providing additional support for her characterization of the work as a useful article, Ms. Giroux emphasized that the definition of "useful article" under 17 U.S.C. § 101 explicitly states: "An article that is normally a part of a useful article is considered a 'useful article'." *Id.* She then noted that the end hook is normally part of a tape measure and therefore, under the statutory definition, the end hook is a "useful article." *Id.*

Having classified SCULPTURE as a useful article, Ms. Giroux explained that in order to support a copyright registration, a useful article must incorporate some pictorial, graphic, or sculptural features that can be "identified separately from, and are capable of existing independently of, the utilitarian aspects of the article." 17 U.S.C. § 101: definition of *pictorial, graphic, and sculptural works*. Referring to the legislative history of the 1976 Copyright Act, she clarified that such "separability" may be physical or conceptual. (Letter from Giroux to Friederichs of 7/16/03, at 1.) She explained that Copyright Office Examiners do not make aesthetic judgments in examining a work, nor are they influenced by the attractiveness of the design, its uniqueness, its visual effect and appearance, the time and effort it took to create, or its commercial success in the marketplace. *Id.* at 2 (citing *Compendium II: Compendium of Copyright Office Practices* (1984) ("*Compendium II*"), § 505.05). She then described the Copyright Office's tests for physical and conceptual separability, as presented in *Compendium II, supra*, §§ 505.03 and 505.04. Although the Copyright Office's practices regarding physical separability would permit copyrightable works of art that are later incorporated into useful articles to retain

their copyright protection, as in the case of the Balinese dancer lamp base in *Mazer v. Stein*, 347 U.S. 201 (1954), Ms. Giroux concluded that the work at issue fails to meet the Copyright Office's physical separability test. She paraphrased *Compendium II, supra*, § 505.04, in stating that "[s]ince the overall shape of a useful article is not copyrightable, the test of physical separability is not met by the mere fact that the housing or other components of a useful article are detachable from the working parts of the article." (Letter from Giroux to Friederichs of 7/16/03, at 2.)

Ms. Giroux then addressed whether SCULPTURE contains any copyrightable authorship that is conceptually separable from the utilitarian aspects of the article. She first explained that conceptual separability occurs when the pictorial, graphic, or sculptural features of a work can be visualized on paper, for example, or as a free-standing sculpture, independent of the shape of the utilitarian article, without destroying the basic shape of the useful article. *Id.* at 2 (citing *Esquire, Inc. v. Ringer*, 591 F.2d 796 (D.C. Cir. 1978), *cert. denied,* 440 U.S. 908 (1979), and *Compendium II, supra,* § 505.03). She cautioned, however, that the conceptual separability test "is not met by merely analogizing the general shape of a useful article to works of modern sculpture since in this case, the alleged 'artistic or decorative features' and the useful article cannot be perceived as having separate existences." *Id.* She further explained that where certain features are non-functional or could have been designed differently, if such aesthetic features are an integral part of the overall shape or contour of the useful article, no registration is possible. She noted that it has been a long-standing Copyright Office practice to deny copyright claims in the overall shape or form of articles having a utilitarian function, no matter how aesthetically pleasing that shape or configuration might be. *Id.* at 2-3. (citing *Esquire*, 591 F.2d 796, in which the court of appeals upheld the Copyright Office's refusal to register a design for utilitarian outdoor lighting fixtures, even though the design contained aesthetically pleasing features). As an additional precedent supporting her position regarding the registration of a useful article's design, she cited *Norris Indus., Inc. v. Int.'l Tel. & Tel. Corp.*, 696 F.2d 918 (11th Cir. 1983), *cert. denied,* 464 U.S. 818 (1983) (holding that a wire-spoked wheel cover was not copyrightable because it was a useful article lacking any sculptural design that could be identified separately from the wheel cover itself). *Id.* at 3. She also quoted a passage from the legislative history of the 1976 Copyright Act, which clearly reveals the Congressional intent to deny copyright protection to the design of a useful article:

> [T]he Committee is seeking to draw as clear a line as possible between copyrighted works of applied art and uncopyrighted works of industrial design. .... [A]lthough the shape of an industrial product may be aesthetically satisfying and valuable, the Committee's intention is not to offer it protection under the bill.

Id. (citing H.R. Rep. No. 94-1476, at page 55).

Applying the principles discussed above, Ms. Giroux evaluated the work at issue and determined that the work's sculptural elements or components--the non-linear and perforated edges, the tongue-like appearance--cannot be perceived as physically or conceptually separable from the utilitarian article itself without destroying the basic shape of the tape measure. *Id.* She found that all of the work's sculptural elements or features are either related to the utilitarian functions or are subsumed within the overall shape, contour, and configuration of the useful article itself. In conclusion, therefore, she affirmed the refusal of copyright registration for the end hook since the sculptural features cannot be physically or conceptually separated from the utilitarian article, and thus the work does not contain any separable authorship that is copyrightable. *Id.* at 4.

D. Second Request for Reconsideration

By a letter dated November 18, 2003, you filed with the Copyright Office's Board of Appeals a request for a second reconsideration of the denial of registration. Within this letter, you reiterated the arguments you had made in your previous letter and responded to Ms. Giroux's refusal to register the work. You disputed the Copyright Office's characterization of SCULPTURE as a useful article, arguing that Ms. Giroux has confused the work as submitted for registration--the end hook--with the utilitarian item not being offered for registration, the tape measure to which the end hook had been previously attached. (Letter from Friederichs to Giroux of 11/18/03, at 1.) You challenged the Examining Division's determination that SCULPTURE has an intrinsic utilitarian function; indeed, you emphasized that the work "has no known use" and that, therefore, it cannot be a useful item. *Id.* You conceded that the work had previously been part of a useful article, but you asserted that this fact "has no impact" on the copyright protectability of the work--to support this claim, you compared the end hook to the statuette of a Balinese dancer that had been the base of a lamp in *Mazer*. *Id.* at 1, 3. Although disagreeing with the Examining Division's classification of the work as a useful article, you argued that the work "has as much conceptually separable authorship as that found in the belt buckle" of *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989 (2d Cir. 1980). *Id.* at 2.

It is your position that a factor relevant for copyright purposes is the capability of a work to be reconnected to the useful article. You emphasized that, while the work was at one time connected to a tape measure and was useful for hooking objects to be measured, the work as submitted for registration can no longer be re-attached to the tape measure and, therefore, has lost any function. *Id.* at 3. You distinguished the work from the belt buckle in *Kieselstein-Cord*, arguing that the belt buckle was "fully capable of being joined to a belt," while the work at issue is incapable of being joined to a tape measure. (Letter from Friederichs to Giroux of 11/18/03, at 3.)

You also questioned the Examining Division's reliance on *Esquire*, arguing that the Copyright Office practice of denying registration to a useful article's shape is inapplicable to the work at issue because SCULPTURE does not comprise the overall shape of the tape measure, nor does it represent the tape measure housing, nor is it an integral part of the overall appearance of the tape measure. (Letter from Friederichs to Giroux of 11/18/03, at 4.) You also noted that the work, as submitted, is artistic craftsmanship insofar as its form, with the mechanical and utilitarian aspects removed. *Id.* at 4. Since SCULPTURE has been physically separated from the useful article, it is your contention that the work no longer has an intrinsic function and therefore all that remains is the artistic form, similar to the Balinese dancer statuette in *Mazer*. *Id.* at 5.

In summary, you argued that the work is non-useful, can be physically and conceptually separable from the useful article, and therefore is entitled to copyright protection for its aesthetic features: the "red and blue headlight appearance," "jagged edging," and the "boxed tear drop shape." *Id.* at 6-7. You hypothesized that the only reason that the Examining Division has refused to register SCULPTURE is because of "non-appreciation of the artistic value." (Letter from Friederichs to Giroux of 11/18/03, at 7.)

The Board of Appeals has carefully reviewed the application and all materials submitted, at both the first and second levels of reconsideration, in support of registration of SCULPTURE, and has determined that the work is a useful article possessing no authorship that is both separable and copyrightable and therefore, it cannot be registered. Our reasoning follows.

III. DECISION

A. The work is a useful article

In your letter requesting a second reconsideration of the denial of registration, you stated that SCULPTURE "was embodied in a tape measure at one time" and that "the Copyright Office ... cannot identify a **present day use**, because there is none." (Letter from Friederichs to Giroux of 11/18/03, at 2.) (emphasis added) This statement reveals a conflict with the statutory definition of a useful article in Section 101 of the Copyright Act: "An article that is **normally** a part of a useful article is considered a 'useful article'." 17 U.S.C. § 101: definition of *useful article* (emphasis added). The fact that you have physically separated the end hook from the useful article, and that in its current condition the work may not have a "present day use," does not free the work from the consequences of this statutory definition. The end hook is "normally"--even necessarily--a part of a tape measure. Since a tape measure is a utilitarian item, the end hook that is normally attached to the tape measure is considered a "useful article" under the copyright law.

Furthermore, SCULPTURE would qualify as a useful article under the first sentence of the definition of a useful article in 17 U.S.C. § 101, which states that "[a] 'useful article' is an article having an **intrinsic** utilitarian function that is not merely to portray the appearance of the article or to convey information." *Id.* (emphasis added). As the *Esquire* court stated, "it has been the practice of the Copyright Office since 1909 to refuse copyright registration only to those works of a wholly utilitarian nature, which could not be called works of art although they might possess pleasing design." *Esquire,* 591 F.2d at 802, n.19 (citation omitted). We further note that merely titling a metal hook a "SCULPTURE" does not transform it into a work of art deserving copyright protection.

SCULPTURE, when attached to the tape measure, has an intrinsic utilitarian function: it hooks onto objects and assists in pulling out the tape from the tape measure. We reject your assertion that the work has lost this intrinsic utilitarian function because it was physically separated from the utilitarian item and is now incapable of being reattached. (Letter from Friederichs to Giroux of 11/18/03, at 3.) We find no precedents in case law, treatises, or Copyright Office practices, to support your contention that the capability of a work to be reconnected to the useful article has any relevant effect, under the Copyright Act, on the work's intrinsic utilitarian function. Indeed, your own reference to the belt buckle in *Kieselstein-Cord* reveals that such capability does not necessarily determine the copyright eligibility of a work that may or may not be re-attachable to the useful article. The *Kieselstein-Cord* court found that the decorative and jeweled belt buckles were entitled to copyright registration, despite the fact that the buckles were, in your words, "fully capable of being joined to a belt." (Letter from Friederichs to Giroux of 11/18/03, at 3.) We note that the *Kieselstein-Cord* belt buckles, while having an intrinsic utilitarian function that qualified them as "useful articles" under the statutory definition of the Copyright Act, nevertheless were found by the court of appeals to be copyrightable because the buckles contained "conceptually separable sculptural elements" that could be identified independently of the utilitarian aspect of the article. *See Kieselstein-Cord,* 632 F.2d at 993. For the reasons set forth in the section immediately following, your work does not contain conceptually separable, *copyrightable* sculptural elements; therefore, *Kieselstein-Cord* offers no authoritative precedent for the favorable determination of registrability for your work.

B. Separability

The description of pictorial, graphic, and sculptural works in 17 U.S.C. § 101 provides in part:

> [T]he design of a useful article ... shall be considered a pictorial, graphic, or sculptural work *only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from,*

> *and are capable of existing independently of, the utilitarian aspects of the article*. (emphasis added).

From this definition, it is apparent that if a work qualifies as a "useful article," copyright protection for the design of the article is subject to the conditional language highlighted in the italicized text above. However, "[i]f an article is not 'useful'... then it is a pictorial, graphic and sculptural work entitled to copyright protection (assuming the other requirements of the statute are met)." *Pivot Point Int.'l, Inc., v. Charlene Prod., Inc.*, 372 F.3d 913, 919 (7th Cir. 2004). As noted earlier, the legislative intent in including this limiting language in the statutory definition of pictorial, graphic, and sculptural works was

> to draw as clear a line as possible between copyrightable works of applied art and uncopyrighted works of industrial design. ... [A]lthough the shape of an industrial product may be aesthetically satisfying and valuable, the Committee's intention is not to offer it protection under the bill.

H.R. Rep. No. 94-1476, at page 55. Since the Board of Appeals finds SCULPTURE to be a useful article, the issue to be resolved is whether there is any copyrightable authorship in the work that can be physically or conceptually separable from the utilitarian article.

Compendium II describes the physical separability test used by Copyright Office Examiners in evaluating a work's registrability: the pictorial, graphic, or sculptural features of the work must be able to be physically separated from the utilitarian item by ordinary means. *Compendium II, supra,* §§ 505.03 and 505.04. For example, the statuette of a Balinese dancer that serves as a lamp base could satisfy the physical separability test. *See Mazer*, 347 U.S. 201. However, *Compendium II* cautions that "since the overall shape of a useful article is not copyrightable, the test of physical separability is not met by the mere fact that the housing of a useful article is detachable from the working parts of the article." *Compendium II, supra,* § 505.04. Although we recognize your argument that SCULPTURE may not constitute the "housing" of the tape measure nor the "overall shape" of the useful article (Letter from Friederichs to Giroux of 11/18/03, at 4), we observe that the end hook is a **component** of the tape measure, detachable from the working parts of the useful article, just as the "housing" of a useful article could be considered one of the components of that useful article. Since we have already identified an intrinsic utilitarian function for the end hook in the preceding section, we consider the end hook itself to be a "working part" of the useful article. Therefore, although you demonstrated that the end hook component of the tape measure is physically detachable from the *other* working parts of the useful article, this "mere fact" does not help SCULPTURE satisfy the physical separability test described in *Compendium II*.

We find that SCULPTURE also fails to meet the conceptual separability test. Conceptual separability occurs when the aesthetic features of a work are:

> clearly recognizable as a pictorial, graphic, or sculptural work which can be visualized on paper, for example, or as a free-standing sculpture, as another example, independent of the shape of the useful article, *i.e.*, the artistic features can be imagined separately and independently from the useful article without destroying the basic shape of the useful article. The artistic features and the useful article could both exist side by side and be perceived as fully realized, separate works--one an artistic work and the other a useful article.

Compendium II, *supra,* § 505.03. Conceptual separability is not demonstrated "by merely analogizing the general shape of a useful article to works of modern sculpture, since the alleged 'artistic features' and the useful article cannot be perceived as having separate, independent existences." *Id.*

You identified what you claim are artistic features of the end hook: "the non-linear edges and red and blue headlights and/or swooping tongue-like appearance." (Letter from Friederichs to Sukites of 5/5/03, at 5.) In the opinion of the Board of Appeals, all of these allegedly artistic features are either related to the utilitarian functions or are subsumed within the overall shape, contour, and configuration of the useful article itself. These features are not conceptually separable from the useful article without destroying its basic shape. *See Esquire,* 591 F.2d at 800 (upholding the Copyright Office's denial of registration for outdoor lighting fixtures that, the claimant argued, contained non-functional, aesthetic features. The *Esquire* court explained that copyright protection is unavailable for the "overall shape or configuration of a utilitarian article, no matter how aesthetically pleasing that shape may be.")

Finally, we believe your reliance on *Mazer* is misplaced. While *Compendium II, supra,* § 505.04, is in accord with your statement that "original works of art do not cease to be copyrightable, when they are embodied in useful articles" (Letter from Friederichs to Giroux of 11/18/03, at 3), we disagree that the end hook would qualify as a *copyrightable* work of sculpture, for the reasons presented in the following section.

C. The work consists of *de minimis* authorship

Even if the Copyright Office were to classify the work as a non-useful sculpture, as you advocate the Office would still need to consider whether the work had sufficient copyrightable authorship. The design of the end hook simply does not meet the minimal

level of creativity necessary to support a copyright registration. The Supreme Court in *Feist Publ'n, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 363 (1991), explained that "copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity." The *Feist* Court also recognized that there are some works that fail to meet this low standard for copyrightability, in which "the creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Id.* at 359. *See also* 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 2.01[B] (2002) ("[T]here remains a narrow area where admittedly independent efforts are deemed too trivial or insignificant to support a copyright.")

Copyright Office registration practices also support the proposition that works containing only a *de minimis* amount of authorship are not copyrightable. *Compendium II, supra*, § 202.02[a]. For pictorial, graphic, and sculptural works, "a certain minimal amount of original creative authorship is essential for registration." *Compendium II, supra*, § 503.02[a]. For sculptural works, the category in which you have attempted to register the work, *Compendium II* cautions: "[T]he creative expression capable of supporting a copyright must consist of something more than the mere bringing together of two or three standard forms or shapes with minor linear or spatial variations." *Compendium II, supra,* § 503.02[b].

We find that the design elements of SCULPTURE fail to meet the low threshold of creativity required by *Feist* and *Compendium II,* and, therefore, cannot support a registration claim. None of the aesthetic features you identified in the work rise to the level of sufficient creative authorship requisite for copyright protection. Furthermore, the allegedly artistic elements of the end hook design-- the perforated edges, swooping tongue-like appearance--are minor variations on standard shapes which are within the public domain and therefore are not copyrightable. *See Compendium II, supra*, § 503.02[a] ("[R]egistration cannot be based upon the simplicity of standard ornamentation ... it is not possible to copyright common geometric figures or shapes.")[1]

Finally, we reject your claim that the only reason the Examining Division has refused to register SCULPTURE is because of "non-appreciation of the artistic value." (Letter from Friederichs to Giroux of 11/18/03, at 7.) As Ms. Giroux had explained to you, Copyright Office Examiners do not consider as relevant to registrability the aesthetic value of a work's design. (Letter from Giroux to Friederichs of 7/16/03, at 2.) While the design of SCULPTURE may be aesthetically pleasing, the work does not contain the minimal amount of creative authorship to support a copyright registration. This determination does not reflect our judgment of the "artistic value" of the work. Rather, the Board of Appeals has evaluated the end hook to determine whether it contains any

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[1] Although we conclude that SCULPTURE lacks copyrightable elements, we mention to you, as Ms. Giroux had previously noted, that the design of a useful article may be protected by federal patent law. (Letter from Giroux to Friederichs of 7/16/03, at 4.)

copyrightable creative expression. The artistic features of the work entitled SCULPTURE do not possess more than the "*de minimis* quantum of creativity" required to sustain a copyright registration claim.

IV. CONCLUSION

For the reasons stated in this letter, the Copyright Office Board of Appeals concludes that registration was properly denied for SCULPTURE. This decision constitutes final agency action in this matter.

Sincerely,

/s/

Marilyn J. Kretsinger
Associate General Counsel
for the Appeals Board
United States Copyright Office